Supreme Court, U.S.
FILED
MAR 8 2001
CLERK

(2)

No. 00-938

In the Supreme Court of the United States

ANDREW S. GRUMHAUS AND
LESLIE GRUMHAUS DAVIDSON,
Petitioners,

v.

COMERICA SECURITIES, INC.,
AS SUCCESSOR-IN-INTEREST TO COMERICA
FINANCIAL SERVICES, INC.,
Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

JAMES C. SCHROEDER
Counsel of Record
WILLIAM E. DEITRICK
JEFFREY W. SARLES
DAVID W. FULLER
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, IL 60603
(312) 782-0600

Counsel for Respondent

QUESTIONS PRESENTED

1. Whether petitioners waived their right to arbitrate by filing a lawsuit in state court and, after the state court dismissed their complaint without prejudice five months later, waiting another eight months before filing for arbitration.

2. Whether the court of appeals had jurisdiction where the district court entered final judgment after compelling arbitration and dismissing all additional claims, an issue decided earlier this Term in *Green Tree Fin. Corp.* v. *Randolph*, 121 S. Ct. 513 (2000).

RULE 14.1 AND RULE 29.6 STATEMENT

The petition correctly lists the parties in the court of appeals.

Respondent Comerica Securities, Inc. is 100% owned by Comerica Investment Services, Inc., which is 99% owned by Comerica Bank and 1% owned by Comerica, Inc.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 14.1 AND RULE 29.6 STATEMENT ii

STATEMENT OF THE CASE 1

Petitioners' Allegations 1

Petitioners' State Court Suit 1

Petitioners' Arbitration Demand 2

The District Court Proceeding 2

The Court Of Appeals Ruling 3

REASONS FOR DENYING THE PETITION 4

I. THERE IS NO GENUINE CONFLICT OVER HOW TO RESOLVE CLAIMS THAT PARTIES INITIATING JUDICIAL ACTIONS HAVE WAIVED ARBITRATION 5

A. All The Courts Of Appeals View Waiver As A Fact-Intensive Inquiry Involving Multiple Factors, Including Prejudice 5

B. Petitioners Impermissibly Lump Together Waiver Claims Against Both Plaintiffs And Defendants To Generate A False Conflict 10

TABLE OF CONTENTS (Continued)

Page

II. THE PETITION RAISES NO IMPORTANT QUESTION REQUIRING RESOLUTION BY THIS COURT 12

III. THIS COURT'S DECISION IN *GREEN TREE FINANCIAL* HAS RESOLVED THE SECOND ISSUE PRESENTED 14

CONCLUSION 15

TABLE OF AUTHORITIES

Cases **Page**

Ballard Shipping Co., In re, 752 F. Supp. 546 (D.R.I. 1990) 11

Barker v. *Golf U.S.A., Inc.*, 154 F.3d 788 (8th Cir. 1998), cert. denied, 525 U.S. 1068 (1999) 8

Cabinetree, Inc. v. *Kraftmaid Cabinetry, Inc.*, 50 F.3d 388 (7th Cir. 1995) 7, 14

Crysen/Montenay Energy Co., In re, 226 F.3d 160 (2d Cir. 2000), petition for cert. filed (Jan. 11, 2001) (No. 00-1119) 5, 6

Doctor's Assocs. v. *Distajo*, 107 F.3d 126 (2d Cir.), cert. denied, 522 U.S. 948 (1997) 8

Duferco Steel Inc. v. *M/V Kalisti*, 121 F.3d 321 (7th Cir. 1997) 6

First Options, Inc. v. *Kaplan*, 514 U.S. 938 (1995) 13

Frye v. *Paine, Webber, Jackson & Curtis*, 877 F.2d 396 (5th Cir. 1989), cert. denied, 494 U.S. 1016 (1990) 8

Gilmore v. *Shearson/Am. Express Inc.*, 811 F.2d 108 (2d Cir. 1987) 14

Green Tree Fin. Corp. v. *Randolph*, 121 S. Ct. 513 (2000) 14

TABLE OF AUTHORITIES (Continued)

Page

Hoffman Constr. Co. v. *Active Erectors & Installers, Inc.*, 969 F.2d 796 (9th Cir. 1992), cert. denied, 507 U.S. 911 (1993) 8

Iowa Grain Co. v. *Brown*, 171 F.3d 504 (7th Cir. 1999) 6

Jones Motor Co. v. *Chauffeurs, Teamsters & Helpers Local No. 633*, 671 F.2d 38 (1st Cir. 1982) 5

Klehr v. *A.O. Smith Corp.*, 521 U.S. 179 (1997) 9

Kulukundis Shipping Co. v. *Amtorg Trading Corp.*, 126 F.2d 978 (2d Cir. 1942) 11

McWilliams v. *Logicon, Inc.*, 143 F.3d 573 (10th Cir. 1998) 6

Menorah Ins. Co. v. *INX Reins. Corp.*, 72 F.3d 218 (1st Cir. 1995) 8

Morrie Mages & Shirlee Mages Found. v. *Thrifty Corp.*, 916 F.2d 402 (7th Cir. 1990) 6

National Found. for Cancer Research v. *A.G. Edwards & Sons*, 821 F.2d 772 (D.C. Cir. 1987) 6

Navieros Inter-Americanos, S.A. v. *M/V Vasilia Express*, 120 F.3d 304 (1st Cir. 1997) 8

Price v. *Drexel Burnham Lambert, Inc.*, 791 F.2d 1156 (5th Cir. 1986) 5, 6

TABLE OF AUTHORITIES (Continued)

Page

Ritzel Communications, Inc. v. *Mid-Am. Cellular Tel. Co.*, 989 F.2d 966 (8th Cir. 1993) 6, 12

S & H Contractors, Inc. v. *A.J. Taft Coal Co.*, 906 F.2d 1507 (11th Cir. 1990), cert. denied, 498 U.S. 1026 (1991) 6, 8

S & R Co., In re, 159 F.3d 80 (2d Cir. 1998), cert. dismissed, 528 U.S. 1058 (1999) 5

Scherk v. *Alberto Culver Co.*, 417 U.S. 506 (1974) 14

St. Mary's Med. Ctr. v. *Disco Aluminum Prods. Co.*, 969 F.2d 585 (7th Cir. 1992) 6, 7, 12

Stifel, Nicolaus & Co. v. *Freeman*, 924 F.2d 157 (8th Cir. 1991) 11, 12

United States v. *Kubrick*, 444 U.S. 111 (1979) 9

Volt Info. Sciences, Inc. v. *Board of Trustees*, 489 U.S. 468 (1989) 4, 12, 13, 14

Wilson v. *Garcia*, 471 U.S. 261 (1985) 9

Wood v. *Prudential Ins. Co.*, 207 F.3d 674 (3d Cir.), cert. denied, 121 S. Ct. 305 (2000) 8

TABLE OF AUTHORITIES (Continued)

Statutes **Page**

9 U.S.C. § 1 4

9 U.S.C. § 3 7

9 U.S.C. § 4 7

Miscellaneous

2 IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW § 21.3.2.1A (Supp. 1999) 10, 11

The question in this case is whether the petitioners waived their contractual right to arbitrate against respondent Comerica Securities, Inc. ("Comerica") by suing Comerica in state court and, then, after the court dismissed all their claims, seeking arbitration more than 13 months after filing suit. The Seventh Circuit answered the question in the affirmative, applying the same multi-factor, "totality of the circumstances" test to evaluate the claimed waiver that all the other courts of appeals employ. This inquiry is necessarily fact-specific, and any minor variations in the weight the courts of appeals give to particular factors, including prejudice to the nonwaiving party, have little or no impact on the outcome of their waiver determinations. This is especially true in cases such as this one, where the party who initiated litigation is found to have waived arbitration. In short, there is no circuit conflict warranting this Court's review.

STATEMENT OF THE CASE

Petitioners' Allegations. In an attempt to repay overdue personal and business loans to LaSalle Bank ("LaSalle"), petitioners' father apparently forged their signatures on documents pledging as collateral large blocks of Dean Foods stock owned by petitioners, and directed LaSalle to sell the stock. LaSalle asked respondent Comerica, a securities broker, to help effectuate the sale. The stock was sold in 1994 and the proceeds applied to repay the LaSalle loans. Petitioners allegedly did not discover that more than $1 million of stock belonging to them had been sold until two years later. Pet. App. 2a-3a.

Petitioners' State Court Suit. On October 7, 1997, petitioners filed suit against Comerica, LaSalle, and Southwest Securities (another brokerage firm) in Illinois state court. Petitioners alleged that the defendants collectively sold the Dean Foods stock without their permission, and they sought damages equal to the present value of the stock as well as a constructive trust for the proceeds of the sale. Pet. App. 3a. Comerica initially joined in a motion by LaSalle to dismiss petitioners' complaint, but subsequently withdrew its joinder

and instead demanded a bill of particulars. R.22, ¶¶ 43, 52; R.11, Ex. C; R.25, Ex. B. Nevertheless, petitioners' response to the motion to dismiss specifically addressed Comerica's dismissal arguments. R.24, Ex. 3.

On March 17, 1998, the state court dismissed petitioners' complaint in its entirety against all defendants, including Comerica, granting petitioners leave to replead. Pet. App. 3a. The court's dismissal order provided: "Nothing contained herein shall waive any party's right (i) to argue that an alleged contractual arbitration clause compels litigation of this case in another tribunal, or (ii) to argue that any such arbitration clause is either inapplicable or unenforceable." R.22, Ex. J, p. 2. On May 26, 1998, more than two months after the state court dismissed their original complaint, petitioners filed an amended complaint against LaSalle and voluntarily dismissed their claims against Comerica and Southwest Securities without prejudice, stating that they intended to arbitrate their dispute with the two brokerage firms. R.22, ¶ 46 & Ex. K; R.23, Ex. A.

Petitioners' Arbitration Demand. Petitioners waited another six months, until November 23, 1998, before filing a demand for arbitration against Comerica with the National Association of Securities Dealers ("NASD"). R.22, ¶ 17. They never sought arbitration against Southwest Securities, apparently dropping their claims against that brokerage firm. Petitioners' arbitration demand against Comerica alleged, like their complaint in state court, that Comerica had wrongfully sold their stock and relied on forged documents to pay off their father's LaSalle loans. R.22, Ex. C. Petitioners requested the value of the stock as damages. *Ibid.* Comerica responded by denying that petitioners were entitled to arbitrate the parties' dispute. R.22, Ex. E.

The District Court Proceeding. After Comerica refused to proceed with arbitration, petitioners initiated the present litigation by filing a complaint in the district court on March

18, 1999. R.22, ¶¶ 48, 62. They sought to compel arbitration and later amended their complaint to add claims based on the same allegations that they previously had raised in the state court and with the NASD. The district court rejected Comerica's contention that petitioners had waived their right to arbitrate by litigating their claims in state court, and it ordered Comerica to proceed to arbitration. Pet. App. 22a.

The Court Of Appeals Ruling. In a unanimous opinion authored by Judge Kanne and joined by Chief Judge Posner and Judge Coffey, the Seventh Circuit reversed. Looking at the "totality of the circumstances," the court of appeals held that petitioners implicitly waived their right to arbitrate by selecting a judicial forum for resolution of their dispute. Pet. App. 5a-6a. The court explained that although petitioners "were aware of their right to arbitrate," they filed suit against Comerica in state court, litigated their claims for several months, decided to switch to an arbitral forum because they were "disappointed" that the state court dismissed their complaint, and then "waited several more months" – until more than a year after filing the initial state court action – to finally file a demand for arbitration. *Id.* at 7a. The court concluded that "this knowing selection of one forum over another and willing participation in the ensuing litigation was plainly inconsistent with a desire to arbitrate." *Ibid.*

The court rejected petitioners' arguments that they "never submitted their state court action for judgment" and that their state court suit and arbitration demand involved different causes of action. Pet. App. 7a-8a. The court reasoned that by initiating the state court action and filing a complaint, petitioners expressed their intent to submit their claims for decision in a judicial forum. *Id.* at 7a. In addition, in both state court and the arbitration, petitioners charged Comerica with wrongful liquidation of their stock and therefore could not "escape" the effect of their waiver by "restyling" their substantively identical claims. *Id.* at 9a-10a.

Finally, the court determined that "other factors," including an alleged lack of "[p]rejudice and delay," were "not compelling" and thus could not overcome the presumption that petitioners' judicial prosecution of their claims waived their right to an arbitral forum. Although "Comerica was not unduly prejudiced" by the delay, petitioners "took more than a year" to seek arbitration after filing their state court suit, and their "lack of diligence" supported a finding that they had waived their right to arbitrate. Pet. App. 10a-11a.

REASONS FOR DENYING THE PETITION

As demonstrated below, all the courts of appeals evaluate waiver of the right to arbitrate much the same as waiver of any other contractual right, thereby implementing this Court's mandate to place arbitration agreements "upon the same footing as other contracts." *Volt Info. Sciences, Inc.* v. *Board of Trustees*, 489 U.S. 468, 474 (1989). The circuits uniformly apply a multi-factor, totality of the circumstances standard to waiver issues, and minor variations in the weight given to particular factors, including prejudice to the nonwaiving party, do not establish the type of conflict appropriate for this Court's review. Especially where, as here, the party charged with waiver initiated the court action and waited over a year to demand arbitration, waiver of its right to arbitrate would be manifest no matter how a court balanced particular factors.

Furthermore, the petition raises no issue of genuine importance. The decision below was fully consistent with federal arbitration policy, which recognizes that the right to arbitrate rests on the consent of the parties and thus may be abrogated by one party's resort to litigation. Petitioners' focus on the prejudice factor is inconsistent with the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, which expressly recognizes, without mentioning prejudice or any other factor, that parties may waive the right to use its enforcement mechanisms.

I. THERE IS NO GENUINE CONFLICT OVER HOW TO RESOLVE CLAIMS THAT PARTIES INITIATING JUDICIAL ACTIONS HAVE WAIVED ARBITRATION.

A. All The Courts Of Appeals View Waiver As A Fact-Intensive Inquiry Involving Multiple Factors, Including Prejudice.

Determining whether a party has waived its right to arbitrate by resorting to litigation necessarily requires a highly fact-specific inquiry. For that reason, the courts of appeals uniformly evaluate a claim of waiver by looking to the totality of the circumstances and applying multiple factors. The Second Circuit's approach is typical:

> [I]n determining whether a party has waived its right to arbitration, we will consider such factors as (1) the time elapsed from commencement of litigation to the request for arbitration, (2) the amount of litigation (including any substantive motions and discovery), and (3) proof of prejudice. There is no bright-line rule, however, for determining when a party has waived its right to arbitration: the determination of waiver depends on the particular facts of each case.

In re Crysen/Montenay Energy Co., 226 F.3d 160, 163 (2d Cir. 2000) (citation omitted), petition for cert. filed (Jan. 11, 2001) (No. 00-1119).[1/]

[1/] See also, *e.g.*, *Jones Motor Co.* v. *Chauffeurs, Teamsters & Helpers Local No. 633*, 671 F.2d 38, 44 (1st Cir. 1982) (applying numerous "relevant factors" in waiver analysis); *In re S & R Co.*, 159 F.3d 80, 83 (2d Cir. 1998) (waiver inquiry "is fact-specific and there are no bright-line rules"), cert. dismissed, 528 U.S. 1058 (1999); *Price* v. *Drexel Burnham*

In accord with this established approach, the Seventh Circuit looked to "all the circumstances" to decide whether there was a waiver in this case (see Pet. App. 6a), as it does consistently. See *Iowa Grain Co.* v. *Brown*, 171 F.3d 504, 510 (7th Cir. 1999) (court must look at "the totality of the circumstances" to decide whether waiver occurred); *Duferco Steel Inc.* v. *M/V Kalisti*, 121 F.3d 321, 326 (7th Cir. 1997) (waiver determination is "based on the circumstances") (quoting *St. Mary's Med. Ctr.* v. *Disco Aluminum Prods. Co.*, 969 F.2d 585, 588 (7th Cir. 1992)); *Morrie Mages & Shirlee Mages Found.* v. *Thrifty Corp.*, 916 F.2d 402, 405 (7th Cir. 1990) (waiver depends on "the circumstances of the particular case"). Thus, the circuit courts of appeals are in fundamental agreement about how to analyze a claim of waiver.

Prejudice to the party claiming waiver is one of the factors that the circuit courts use to evaluate a waiver claim. *E.g.*, *Crysen/Montenay*, 226 F.3d at 163 (noting that the prejudice factor "largely collapses" into the amount of litigation factor); *National Found. for Cancer Research* v. *A.G. Edwards & Sons*, 821 F.2d 772, 777 (D.C. Cir. 1987) ("a court may consider prejudice to the objecting party as a relevant factor"); *Price* v. *Drexel Burnham Lambert, Inc.*, 791 F.2d 1156, 1161 (5th Cir.

Lambert, Inc., 791 F.2d 1156, 1161 (5th Cir. 1986) (waiver depends on "other considerations" in addition to judicial activity and prejudice); *Ritzel Communications, Inc.* v. *Mid-Am. Cellular Tel. Co.*, 989 F.2d 966, 971 (8th Cir. 1993) (waiver depends on "the particular facts" and "all the circumstances"); *McWilliams* v. *Logicon, Inc.*, 143 F.3d 573, 576 (10th Cir. 1998) (identifying six factors relevant to waiver determination); *S & H Contractors, Inc.* v. *A.J. Taft Coal Co.*, 906 F.2d 1507, 1514 (11th Cir. 1990) (addressing waiver "under the totality of the circumstances"); *National Found. for Cancer Research* v. *A.G. Edwards & Sons*, 821 F.2d 772, 777 (D.C. Cir. 1987) (considering various "circumstances" in addressing waiver).

1986) (considering prejudice "along with other considerations"). Like its sister circuits, the Seventh Circuit considers prejudice to be one of many factors in the waiver inquiry. See *St. Mary's*, 969 F.2d at 590 ("prejudice is but one relevant circumstance"). Indeed, depending on "a variety of circumstances," the Seventh Circuit maintains that in some cases "prejudice to the other party, the party resisting arbitration, should weigh heavily." *Cabinetree, Inc.* v. *Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 391 (7th Cir. 1995). In the decision below, the Seventh Circuit again recognized that "[p]rejudice and delay also may be factors" in the waiver inquiry, but concluded that "these factors are not compelling here" in light of the specific facts of this case. Pet. App. 11a.

To be sure, some courts of appeals, including the Seventh Circuit, sometimes accord the prejudice factor less weight than others do when balancing the totality of the circumstances for waiver purposes in a specific case. But any such variation among the circuits in how much weight they give particular factors in individual cases hardly suggests a genuine or important conflict of the type warranting this Court's resolution.

In fact, the FAA itself indicates otherwise. Congress inscribed its recognition that a party may waive its right to arbitrate into the text of the FAA – *without any mention of prejudice or any other factor*. Section 3 authorizes a court to stay litigation pending arbitration only if the applicant "is not in default." Section 4 authorizes a court to compel arbitration only if the "the failure [of the applicant] to comply [with the agreement] is not in issue." See 9 U.S.C. §§ 3-4. Neither provision mentions prejudice or any other factor, leaving the courts with discretion and leeway in their application of particular factors to particular circumstances.

The courts have been applying that discretion on a case-by-case basis for many years, and any differences in the weight

they accord particular factors, including prejudice, have proven tolerable. This Court has repeatedly denied petitions for certiorari from such waiver decisions.[2/] Petitioners offer no plausible reason to reverse course now.

The cases show that the courts' varying weightings of the prejudice factor rarely if ever affect the outcome of a case. Even if prejudice were deemed a required element, as petitioners propose, the impact would be nonexistent or negligible. For example, in *Navieros Inter-Americanos, S.A.* v. *M/V Vasilia Express*, 120 F.3d 304 (1st Cir. 1997), the First Circuit insisted that the party urging waiver "must show prejudice," yet it found that a party's participation in litigation that resulted in a delay of "only one month" waived its right to arbitrate. *Id.* at 316. The Seventh Circuit in this case, without requiring a showing of prejudice, similarly found waiver where petitioners litigated for almost eight months and waited still another five months to demand arbitration. In each case, the court looked to the conduct of the party charged with waiver in the specific factual context at hand. How the courts articulated the significance of the prejudice factor was not determinative. See also *Menorah Ins. Co.* v. *INX Reins. Corp.*, 72 F.3d 218,

---

[2/] *E.g.*, *Wood* v. *Prudential Ins. Co.*, 207 F.3d 674 (3d Cir.), cert. denied, 121 S. Ct. 305 (2000); *Barker* v. *Golf U.S.A., Inc.*, 154 F.3d 788 (8th Cir. 1998), cert. denied, 525 U.S. 1068 (1999); *Doctor's Assocs.* v. *Distajo*, 107 F.3d 126 (2d Cir.), cert. denied, 522 U.S. 948 (1997); *Hoffman Constr. Co.* v. *Active Erectors & Installers, Inc.*, 969 F.2d 796 (9th Cir. 1992), cert. denied, 507 U.S. 911 (1993); *S & H Contractors, Inc.* v. *A.J. Taft Coal Co.*, 906 F.2d 1507 (11th Cir. 1990), cert. denied, 498 U.S. 1026 (1991); *Frye* v. *Paine, Webber, Jackson & Curtis*, 877 F.2d 396 (5th Cir. 1989), cert. denied, 494 U.S. 1016 (1990).

221 (1st Cir. 1995) (stating that party would have waived arbitration whether or not court used prejudice "litmus test").

The decision below further reveals the absence of any real conflict on this issue, because the court of appeals did not completely ignore the prejudice factor, as petitioners contend. The court concluded that Comerica was "not *unduly* prejudiced" (Pet. App. 11a, emphasis added), indicating that in its view Comerica did suffer some prejudice from petitioners' resort to the courts and 13-month delay in seeking arbitration. The extent of that prejudice may have been limited, but other factors bearing on waiver, especially petitioners' plain rejection of their right to arbitrate by bringing suit and their belated invocation of that right only after dismissal of their complaint, more than compensated. Given these circumstances, the Seventh Circuit's adoption of petitioners' proposed waiver standard would not affect the outcome of this case, demonstrating the illusory nature of the apparent conflict they assert.[3/]

[3/] Comerica was inherently prejudiced by petitioners' long delay in seeking arbitration. "Just determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost." *Wilson* v. *Garcia*, 471 U.S. 261, 271 (1985); see also *Klehr* v. *A.O. Smith Corp.*, 521 U.S. 179, 187 (1997) (parties who have been "sleeping on their rights" may not bring suit "only long after the memories of witnesses have faded or evidence is lost"); *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979). That risk is especially great in this case because defending against petitioners' claims likely will require Comerica to seek discovery from third parties (including LaSalle Bank) concerning the relevant events, which occurred some seven years ago.

B. Petitioners Impermissibly Lump Together Waiver Claims Against Both Plaintiffs And Defendants To Generate A False Conflict.

In applying the totality of the circumstances test to a claimed waiver of arbitration, the lower courts regard the litigation status of the party charged with waiver as an important factor. Where that party *initiated* the litigation and thus plainly *chose* not to arbitrate, a finding of waiver is more likely than where a party simply participated in a judicial proceeding initiated by the other party.

Petitioners fail to account for this critical difference. Almost all the cases that petitioners contend conflict with the decision below involved a claimed waiver *by the defendant* in a court action initiated by the other party. See cases cited at Pet. 19-20. But in cases like this one, where petitioners were plaintiffs in the state court action that they initiated, the inconsistency of their conduct with their agreement to arbitrate is obvious, necessarily reducing the importance of other factors, such as prejudice.

This point, and the absence of a true conflict on the waiver inquiry, has been recognized by the leading treatise on federal arbitration law. See 2 IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW § 21.3.2.1A (Supp. 1999). Recognizing "the importance of being the complaining party in litigation as an important factor in waiver of the right to arbitrate," the authors explain that the Seventh Circuit's position is consistent with the position of the other courts of appeals:

> [I]t is necessary to distinguish between those choosing to use the litigation route as plaintiffs or counterclaimants and those who are defending where the other party has chosen litigation. While defendants have sometimes been held to have waived arbitration by their responses to litigation against them, the courts are generally reluctant to find sufficient prejudice to the

> plaintiff (or other claimant) from those activities to find waiver.
>
> On the other hand, in quite a few cases courts have explicitly or impliedly distinguished between defendants and plaintiffs and have held that parties initiating litigation have thereby waived their right to arbitrate. * * * [T]here appear to be considerably more cases where the courts have found prejudice respecting plaintiffs than there are respecting defendants. Thus, at least respecting plaintiffs (and probably counter- and cross-claimants), the prejudice requirement may be considerably weaker, and *in actual operation not far from the Seventh Circuit position.*"

Ibid. (emphasis added; footnotes omitted).[4/]

Petitioners rely (Pet. 16) on a single case where the absence of prejudice led to a finding of no waiver on the part of a plaintiff. See *Stifel, Nicolaus & Co.* v. *Freeman*, 924 F.2d 157 (8th Cir. 1991). But in *Stifel*, "no issues were litigated," *id.* at 159, and the plaintiff sought arbitration immediately after the defendant filed counterclaims (thereby placing the plaintiff in the position of defendant with respect to the counterclaims). In this case, to the contrary, the issues were litigated to the point where the state court ordered petitioners' complaint dismissed,

---

[4/] The courts have long distinguished waivers by plaintiffs from those by defendants. See *Kulukundis Shipping Co.* v. *Amtorg Trading Corp.*, 126 F.2d 978, 989 (2d Cir. 1942) (a plaintiff waives arbitration by suing on a contract rather than demanding arbitration, but the situation ordinarily is "different in the case of a defendant" who has not filed a counterclaim); *In re Ballard Shipping Co.*, 752 F. Supp. 546, 549 (D.R.I. 1990) (noting that "a plaintiff's initiation of a suit has been considered a determinative factor in a waiver analysis").

and petitioners' belated decision to arbitrate came as a reaction to that bad news, not to any counterclaims from other parties.

Moreover, in a more recent case, the Eighth Circuit pulled back from *Stifel*. In *Ritzel Communications, Inc.* v. *Mid-Am. Cellular Tel. Co.*, 989 F.2d 966 (8th Cir. 1993), the court found that the cross-claim defendants' motion for a separate trial represented an "initial choice to litigate" and was inconsistent with their arbitration rights. *Id.* at 969 & n.6. The Eighth Circuit relied heavily on *St. Mary's*, one of the Seventh Circuit decisions that petitioners claim (Pet. 21-22) conflict with the Eighth Circuit's position. *Ritzel*, 989 F.2d at 970. Indeed, the Eighth Circuit observed that in *St. Mary's* "[t]he Seventh Circuit recognized that waiver depends on the circumstance of each case." *Ibid.* The Eighth Circuit agreed with that formulation, holding that "[w]hether there is waiver depends on the particular facts before us" and concluding, "[a]fter examining all the circumstances," that arbitration had been waived. *Id.* at 971. Thus, *Ritzel* does not support petitioners' attempt to drive a doctrinal wedge between the Eighth and Seventh Circuits. Both courts address waiver claims with much the same totality of the circumstances approach, and any insignificant differences about how much weight to give the prejudice factor do not transform that common approach into a certworthy conflict.

II. THE PETITION RAISES NO IMPORTANT QUESTION REQUIRING RESOLUTION BY THIS COURT.

As this Court has emphasized repeatedly, the FAA's purpose was to place arbitration agreements "upon the same footing as other contracts." *E.g.*, *Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 474 (1989) (citation omitted). The FAA embodies a federal policy favoring enforcement of contracts, including agreements to arbitrate, and does not make arbitration agreements any more enforceable than other

contracts. *Id.* at 478. Thus, like any other contractual right, arbitration may be waived, and the decision below simply applied that established principle to the factual circumstances existing here.

Petitioners' contention (Pet. 25) that the decision below undermines the "the national policy favoring arbitration" rests on a misunderstanding of that policy. According to petitioners (*id.* at 26), courts must "resolve any doubts of arbitrability and waiver in favor of arbitration." But it is well settled that the FAA "does not confer a right to compel arbitration of any dispute at any time," and federal policy does not favor arbitration where agreement to arbitrate is lacking. *Volt*, 489 U.S. at 474. Thus, this Court has emphasized that whether the parties have agreed to arbitrate (as opposed to whether a dispute is within the scope of an arbitration agreement) is not a question subject to any pro-arbitration policy but is to be decided based on neutral contract law principles. See *First Options, Inc.* v. *Kaplan*, 514 U.S. 938, 944-945, 947 (1995).

At bottom, "the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes," but to ensure that arbitration agreements are enforced "according to the intentions of the parties." *First Options*, 514 U.S. at 947. Accordingly, whether a party has waived its right to arbitrate – *i.e.*, whether it has demonstrated an intent not to arbitrate – is not subject to any pro-arbitration policy presumption. Because "a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration" (*id.* at 945), federal policy does not authorize a party to reclaim a right to arbitrate that it repudiated by going to court. Just as parties subject to an arbitration agreement may agree to exclude certain claims from that agreement (*Volt*, 489 U.S. at 478), so a party may forfeit an agreement to arbitrate its claims by seeking to resolve them judicially – precisely what occurred in this case. Recognizing that a party may waive its right to arbitrate simply gives effect to the "expectations of the

parties, without doing violence to the policies behind the FAA." *Id.* at 479. And how courts weigh the many factors bearing on waiver does not even implicate those policies, much less do violence to them.

Finally, even if this case raised any issues sufficiently important to warrant this Court's review, it would be an unsuitable candidate to resolve those issues because the decision below rested largely on plaintiffs' manifest bad faith. They played the litigation card as long as they thought it favorable and turned to arbitration only because they were "disappointed" with the state court's dismissal of their complaint. Pet. App. 7a. Such game-playing is repugnant no matter what the waiver standard, making petitioners' case unworthy of review by this Court. See *Scherk* v. *Alberto Culver Co.*, 417 U.S. 506, 517 (1974) (courts should not construe arbitration law to invite "unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages"); *Cabinetree*, 50 F.3d at 391 (waiving party "wanted to play heads I win, tails you lose"); *Gilmore* v. *Shearson/Am. Express Inc.*, 811 F.2d 108, 113 (2d Cir. 1987) (warning that a delayed assertion of arbitration may be a "tactic in a war of attrition").

III. THIS COURT'S DECISION IN *GREEN TREE FINANCIAL* HAS RESOLVED THE SECOND ISSUE PRESENTED.

After the petition was filed, this Court decided *Green Tree Fin. Corp.* v. *Randolph*, 121 S. Ct. 513 (2000), which held that where "the District Court has ordered the parties to proceed to arbitration, and dismissed all the claims before it, that decision is 'final' within the meaning of [FAA] § 16(a)(3), and therefore appealable." *Id.* at 521. That is precisely the situation here. *Green Tree* thus resolved the second issue presented in the petition, and the jurisdiction of the court of appeals to hear this case is no longer at issue.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

JAMES C. SCHROEDER
Counsel of Record
WILLIAM E. DEITRICK
JEFFREY W. SARLES
DAVID W. FULLER
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, IL 60603
(312) 782-0600

MARCH 2001